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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Federal Communications Commission
Office of the Secretary

In re)
Application of Four Jacks)
Broadcasting, Inc.)
)
For a Construction Permit)
For a New Television)
Facility on Channel 2 in)
Baltimore, Maryland)

FCC File No. BPCT-910903KE

TO: The Chief, Mass Media Bureau

PETITION TO DISMISS

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RL 5/5/92

Summary

The application of Four Jacks Broadcasting, Inc. ("Four Jacks") for authority to construct a new television station on Channel 2 in Baltimore was filed in violation of Section 73.3518 of the Commission's rules and must be dismissed. Section 73.3518 prohibits the filing of inconsistent applications, and Four Jacks' proposal was in conflict with the grant of another application then pending on behalf of the same principals: co-owned Chesapeake Television, Inc.'s ("Chesapeake") application for renewal of license for Station WBFF(TV), Baltimore, MD. Section 73.3555(a) of the rules barred the grant of Four Jacks' application while Chesapeake's renewal application was pending.

The Commission has previously addressed proposals similar to

of the grant of Chesapeake's renewal application likewise does not cure the violation.

Dismissal of Four Jacks' application is also necessary in order to preclude opening the door to abuse of the Commission's processes by persons pursuing solely private interests. Four Jacks structured its application so that if it is successful in gaining Channel 2, its principals then would be able to sell Channel 45. A licensee cannot properly be permitted to reap such a financial windfall from the sale of an authorization that it has chosen to abandon in favor of gaining an improved mutually exclusive authorization. The Commission previously has recognized the impropriety of permitting such private gains and has dismissed inconsistent applications to prevent this from occurring.

In addition, accepting Four Jacks' application would provide licensees with a major financial incentive to attack other incumbent licensees' authorizations solely in the hope of achieving the immense private gains available from sale of their existing facilities. The Commission should not unnecessarily encourage such improper burdens on the use of its comparative hearing processes. Finally, acceptance of Four Jacks' improperly filed application would prejudice Scripps Howard and would misallocate resources away from processing properly filed applications for new facilities.

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PETITION TO DISMISS

Introduction

Scripps Howard Broadcasting Company ("Scripps Howard"),
through counsel, hereby petitions for the dismissal of the above-
captioned application of Four Jacks Broadcasting, Inc. ("Four
Jacks").¹ The acceptance for filing of Four Jacks' application

73.3555(a) which bars common ownership of two television stations in the same market, Four Jacks' application for new facilities on Channel 2 could not have been granted while Chesapeake's renewal application for Channel 45 was pending. See 47 C.F.R. § 73.3555(a).

Section 73.3518 of the Commission's rules prohibits the filing of such inconsistent applications either "by or on behalf of or for the benefit of" the same applicant.² Commission precedent interpreting this rule holds that while an applicant seeking renewal of a broadcast facility may, at the same time, seek authority to amend those facilities in order to specify a different and improved frequency for offering service to its community, an applicant cannot seek to construct new facilities while pursuing a renewal application for facilities on a different frequency in the same market. Atlantic Broadcasting Co., FCC 66-894, 8 Rad. Reg. 2d (P&F) 967, 968 n.1 (1966); Wabash Valley Broadcasting Corp., FCC 59-466, 18 Rad. Reg. (P&F) 559,

² Section 73.3518 provides:

While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.

47 C.F.R. § 73.3518 (1991). This rule previously has been set out at Section 1.362, see WSTV, Inc., 8 Rad. Reg. (P&F) 854, 855 n.3 (1953); at Section 1.308, see Wabash Valley Broadcasting Corp., 18 Rad. Reg. 559, 566 n.3 (1959); and at Section 1.518, see Chapman Radio and Television Co., 20 Rad. Reg. 2d 1144, 1148 n.9 (Rev. Bd. 1971). The text has remained substantially unchanged.

568 (1959). See also Southern Keswick, Inc., 34 F.C.C.2d 624, 625-626 (1972) (explaining Wabash Valley's precedential effect).

Because the filing of Four Jacks' application for facilities violated Section 73.3518 of the rules, the application is "defective" as that term is defined in Section 73.3566(a).³ No request for waiver accompanied the application, and therefore, in accord with Section 73.3566(a), Four Jacks' application was improperly accepted for filing and must now be dismissed. See Big Wyoming Broadcasting Corp., 2 F.C.C.R. 3493, 3494 (1987) (dismissing a last-filed application on basis of violation of Section 73.3518).

The acceptance and processing of Four Jacks' application also would set an extraordinarily bad precedent that would open the door to abuse of the Commission's processes by persons pursuing solely private interests while heavily burdening already strained Commission resources. Four Jacks has structured its

³ Section 73.3566(a) provides:

(a) Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.

47 C.F.R. § 73.3566(a) (1991).

application so that if it should be successful in supplanting Scripps Howard as the licensee of Channel 2 in Baltimore, it would then be able to sell its authorization for Channel 45 for many millions of dollars. The Commission's established policy of requiring existing licensees to seek new facilities in the same market by the vehicle of amending their existing authorizations prevents such windfall profits by leaving the successful applicant with nothing to sell. If Four Jacks' approach is permitted, however, the Commission will be unable to identify and exclude those who are improperly utilizing the Commission's resource-devouring comparative hearing process on the chance of attaining a windfall profit from the sale of the property that must be divested. As explained herein, existing Commission policy prohibits such adventurism at the public's expense. The dismissal of Four Jacks' application is necessary to preserve that policy.

Argument

- I. **The Commission has consistently held that Section 73.3518 precludes the filing of an application for new facilities where the applicant properly should seek modification of existing facilities in the same service.**

Four Jacks' application for new facilities on Channel 2 was improperly accepted for filing because under the rules it could not be granted during the pendency of the application of Chesapeake for renewal of the license of Channel 45 in Baltimore. Chesapeake and Four Jacks are under common control, and just as in the Atlantic decision, the multiple ownership rule (now

Section 73.3555(a)) precludes the grant of an application for a new facility to serve the same community where an application for renewal of license filed by the same parties is pending. See Atlantic Broadcasting Co., 8 Rad. Reg. 2d at 968 n.1.⁴

The Commission does not preclude existing licensees from pursuing efforts to upgrade their facilities by operating on a superior channel. It has consistently found that an application to amend the licensee's existing license to specify a different channel--not an application for a new station--is the means that is consistent with seeking renewal of the currently occupied channel's license. See Atlantic Broadcasting Co., 8 Rad. Reg. 2d at 969; Wabash Valley Broadcasting Corp., 18 Rad. Reg. at 568. See also Chapman Radio and Television Co., 20 Rad. Reg. 2d 1144, 1150 (Rev. Bd. 1971).

In Atlantic and Wabash Valley, the applicants in fact attempted to pursue applications for new facilities, but the Commission recognized that these attempts were impermissible because they were inconsistent with the parties' efforts to retain their existing facilities. See Atlantic Broadcasting Co., 8 Rad. Reg. 2d at 968 n.1; Southern Keswick, Inc. 34 F.C.C.2d 624, 625 (1972) (discussing Wabash Valley). The Commission was able to treat the applicants' proposals as

⁴ As noted in the text of that decision, Atlantic's application for renewal of its existing facilities (Station WUST) was then pending in hearing. 8 Rad. Reg. 2d at 968. The language of n.1 indicates further that the Commission would bar an application to modify facilities by proposing a new station at any time.

applications for a change in their existing stations' facilities so that the applications could be processed. Id.⁵ Such treatment is not possible for the Four Jacks application because the Chesapeake principals did not file an application that can be deemed an "upgrade." They created a wholly separate corporate entity, Four Jacks, to pursue the Channel 2 authorization, and the Commission cannot deem Four Jacks to be pursuing an amendment of Chesapeake's licensed Channel 45 facilities because, inter alia, by FCC rule Four Jacks can exert no control over FCC-licensee Chesapeake.

In Southern Keswick, Inc., 34 F.C.C.2d 624 (1972), the Commission elaborated further on its concern that licensees who are in reality seeking to obtain modified facilities must do so in the context of improving their existing facilities rather than by filing an application for new facilities that is inconsistent with a pending application. In that case, Southern Keswick sought a construction permit to build a new noncommercial FM radio station on a different frequency from its existing FM station and at the same time filed a contingent application to sell the existing FM facilities. Id. The Commission dismissed both of Southern Keswick's applications for violating Section 73.3518 (then Section 1.518). Id. The Commission cited Atlantic and Wabash Valley to support its finding that while Southern

⁵ Atlantic's application to change frequencies nevertheless had to be returned due to its inconsistency with yet another application that was pending on behalf of the applicant. See 8 Rad. Reg. 2d at 968-69.

Keswick's construction permit application purported to be for a new facility, it was in reality an application to amend the current license to specify a different frequency. Southern Keswick, 34 F.C.C.2d at 627. In one respect, this case is distinguished from the present Four Jacks situation principally by the fact that Southern Keswick expressly disclosed from the start its plan to extract private gain from the structure of its proposal. See discussion infra at Section III.

The plain language of the rule and these three cases, Wabash Valley, Atlantic, and Southern Keswick, demonstrate conclusively that Four Jacks' application for new facilities is subject to the prohibition of Section 73.3518.

II. Four Jacks' promise to come into eventual compliance with the multiple ownership rule cannot cure the Section 73.3518 violation, and dismissal of the last-filed application is the required remedy.

Four Jacks' application indicates at Exhibit 4 that its principals will come into compliance with the multiple ownership rule in the event its application for Channel 2 is granted. The Commission has held repeatedly, however, that such an assurance of eventual compliance cannot mitigate a violation of Section 73.3518, where, as here, the pertinent party holds a majority interest in the inconsistent applications. WSTV, Inc., 9 Rad. Reg. (P&F) 175, 178 n.6 (1953); Big Wyoming Broadcasting Corp., 2 F.C.C.R. at 3494.

Interestingly, Four Jacks' principals should be quite aware of the Commission's policy with respect to the inadequacy of a divestiture proposal in this situation because of a case

involving David D. Smith--a major principal of both Four Jacks and Chesapeake. In Comark Television Inc., 51 Rad. Reg. 2d (P&F) 738 (1982), the Commission approved the processing of numerous applications for new FM facilities in which Mr. Smith held minority interests even though Mr. Smith had interests in so many applications that not all of them could be granted under the national multiple ownership rule limits. The Commission held that because Mr. Smith could easily divest some of these minority interests if necessary and thus bring the applications into compliance with the rules so as to avoid the possibility that some would necessarily be dismissed, the processing of all the applications could continue. Id. at 741. Crucially, however, the Commission expressly relied upon its finding that the filing of all these applications did not violate Section 73.3518 of the rules because the applications in which Mr. Smith held minority interests "were not filed 'by or on behalf of or for the benefit

violation of the inconsistent application rule, we believe that appropriate action is the dismissal of the latest filed application." 2 F.C.C.R. at 3494 (citations omitted).

Finally, the fact that Chesapeake's renewal application has now been granted is irrelevant to determining whether Four Jacks' application was acceptable when filed. As the Commission emphasized in Big Wyoming Broadcasting Corp., "Section 73.3518 is designed to 'prevent abuse of the Commission's processes by the filing of two or more applications which are inconsistent with each other.'" 2 F.C.C.R. at 3493 (quoting WSTV, Inc., 17 F.C.C. 530, 531 (1953)) (emphasis in Big Wyoming Broadcasting Corp.). Thus, a subsequent event--there a proffered amendment to one of the applications--cannot cure "the violation of a rule which occurred upon the act of filing the application." Id. Likewise, the fact that the Commission could and did process and grant Chesapeake's uncontested renewal application does not make Four Jacks' application for new facilities consistent with that renewal application, or undo the violation of the rule. As the Commission explained in Valley Broadcasting Co., Section 73.3518 applies whenever dismissal of one of the conflicting applications might be required by grant of the other. 58 Rad. Reg. 2d (P&F) 945, 948 (1985). The then pending Chesapeake renewal application absolutely precluded the grant of Four Jacks' application when it was filed, and, as discussed further infra, the happenstance that the Chesapeake renewal application did not draw a competing application, was uncontested, and was granted provides no basis

for departure from strictly applying the terms of Section 73.3518 which prohibited the filing of Four Jacks' application.

III. Sound public policy and the express policies underlying Section 73.3518 support the dismissal of Four Jacks' application.

The acceptance of the Four Jacks application would reverse existing sound public policy and precedent that protects against abuse of Commission processes for private gain. Under the licensing system set out in the Communications Act, licensees are granted their authorizations without any financial charge for the valuable spectrum they utilize. Accordingly, a licensee should not be permitted to reap a huge financial windfall from the sale of an authorization that it chooses to abandon in favor of gaining an improved mutually exclusive authorization. The Commission previously has recognized the impropriety of licensee efforts to pursue private gain through filing inconsistent applications, and it has acted to prevent this by dismissing the inconsistent applications. Southern Keswick, 34 F.C.C.2d at 625-627. It would be a major error to revoke this sound policy by accepting Four Jacks' application.

Separately, accepting Four Jacks' application would provide existing licensees with a major financial incentive to attack other incumbent licensees' authorizations solely in the hope of achieving immense private gains. The comparative hearing system is extraordinarily burdensome to public resources as well as to the private litigants involved. Offering any unnecessary encouragement to the improper utilization of this process plainly

is inconsistent with the Commission's obligation to conserve public resources for achieving public interest goals. Applicants who claim the right to invoke the comparative renewal hearing

the Four Jacks application would confuse the comparative issues in the required comparative renewal hearing to Scripps Howard's detriment. Four Jacks' principals' proposal is in reality a proposal to abandon offering television service on Channel 45 and to initiate service on Channel 2. The negative effects of that abandonment of Channel 45 service could be ignored, however.

a compelling rationale for not strictly applying established Commission policy and requiring that Chesapeake submit a timely modification application which is in accord with the rules.

Under all these circumstances, and particularly in the absence of a timely filed request for waiver of Section 73.3518, no policy ground exists for departing from strict application of the terms of that rule, and severe public detriment would occur from encouraging licensees to further burden the Commission's scarce resources in hopes of achieving unwarranted private gains.

Conclusion

Commission precedent confirms that the filing of Four Jacks' application for new facilities violated Section 73.3518 of the rules. No request for a waiver of this rule accompanied Four Jacks' application, and Four Jacks' application cannot be deemed to be an application for modification of Chesapeake's Channel 45 license. Sound public policy and the specific purposes of Section 73.3518 would be ill served by processing Four Jacks' application. Accordingly, the Four Jacks application must be dismissed as defective in accord with Section 73.3566(a).

Respectfully submitted,

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